NO. 44639-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH ROWLEY, III, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 12-1-00570-4

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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1. Did the trial court properly accept defendant's guilty plea after determining it was made voluntarily, competently and with a full understanding of the nature and consequences of the plea, including a correct calculation for the offender score?

2. Should this court dismiss the personal restraint petition when the claims are unsupported by competent evidence and when most of the claims were waived when petitioner entered his guilty plea?

3. Should the court dismiss the petition when petition has failed to demonstrate that any error occurred?

B. STATEMENT OF THE CASE.

On February 15, 2012, the Pierce County Prosecuting Attorney's Office charged appellant, Joseph E. Rowley, III (defendant or petitioner), with two counts of rape of a child in the first degree, two counts of rape in the second degree, two counts of rape of a child in the third degree, unlawful delivery of a controlled substance (methamphetamine) to a person under the age of eighteen and possession of an explosive device. CP 1-4. "M.N.W." was alleged to be the victim of the sex offenses. *Id.*

The State later amended the charges to include additional counts of sexual exploitation of a minor and possession of depictions of minor engaged in sexually explicit conduct in the first degree, tampering with a witness and attempted violation of a protection order. CP 20-24, 55-60.

At one point, defendant was allowed to proceed pro se, CP 32, but the court later allowed for reinstatement of representation by counsel. 11/16/12 RP 5-6.

On January 9, 2013, the parties were before the court for entry of guilty plea. 1/9/113 RP 2-3. The court accepted a third amended information charging defendant with one count of rape of a child in the second degree and unlawful delivery of a controlled substance (methamphetamine) to a person under the age of eighteen in exchange for defendant's guilty plea. CP 70-71, 73-82; 1/9/13 RP 3-17.

Defendant was sentenced on February 11, 2013. CP 90-104. The court imposed a standard range indeterminate sentence of 123 months to life for the rape of a child in the second degree and a standard range sentence of 68 months on the drug offense, concurrent. *Id.*

Defendant filed a timely notice of appeal from entry of this judgment. CP 108-109.

On July 18, 2013, defendant filed a CrR 7.8 motion to modify or correct judgment in the superior court. This was forwarded to the Court of

Appeals to be handled as a personal restraint petition. The court consolidated the petition with the direct appeal.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ACCEPTED DEFENDANT'S GUILTY PLEA AFTER DETERMINING IT WAS MADE VOLUNTARILY, COMPETENTLY, AND WITH A FULL UNDERSTANDING OF THE NATURE AND CONSEQUENCE OF THE PLEA, INCLUDING A CORRECT CALCULATION FO THE OFFENDER SCORE.

A court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2. The State bears the burden of proving the validity of a guilty plea. ***Wood v. Morris***, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976). The record from the plea hearing must establish that the plea was entered voluntarily and intelligently. ***State v. Branch***, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) citing ***Wood***, 87 Wn.2d at 511. When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. ***State v. Smith***, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), citing ***State v. Perez***, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain,

there is a presumption that the plea is knowing, intelligent and voluntary. ***In re Personal Restraint of Ness***, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). "A defendant's signature on the plea form is strong evidence of a plea's voluntariness." ***State v. Branch***, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). If the trial court orally inquires into a matter that is on this plea statement, the presumption that the defendant understands this matter becomes "well nigh irrefutable." ***Branch***, 129 Wn.2d at 642 n.2; ***State v. Stephan***, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). After a defendant has orally confirmed statements in this written plea form, that defendant "will not now be heard to deny these facts." ***In re Personal Restraint of Keene***, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

In this case, the complete record shows that defendant's pleas were made voluntarily, competently, and with a full understanding of the nature and consequences of the pleas. Defendant, who was represented by counsel, entered into a plea agreement with the State to resolve the charges against him; the State dismissed several charges against him in exchange for his guilty plea. 1/9/13 RP 2-4. Defendant completed a plea statement with the assistance of counsel; counsel indicated that he believed the defendant understood the consequences of entering a guilty plea and that the plea agreement was favorable to defendant because it

involved " a substantial reduction in charges." CP 73-82; 1/9/13 RP 3-5. Defendant affirmed his understanding of the consequences of that plea and his willingness to enter a plea to the trial court. 1/9/13 RP 5-17. He affirmatively represented to the court that he was entering his plea freely and voluntarily. 1/9/13 RP 17. Under the authority cited above, this record shows of the taking of a knowing and voluntary plea.

For the first time on appeal, defendant disputes the voluntariness of his plea. The State does not contest that he may challenge the taking of his plea for the first time on appeal. Generally, a voluntary guilty plea acts as a waiver of the right to appeal all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to challenges of the State's legal power to prosecute regardless of factual guilt. ***State v. Smith***, 134 Wn.2d 849, 852-553, 953 P.2d 810 (1998).

Generally, a defendant is entitled to challenge the trial court's offender score calculation for the first time on appeal when the alleged error is a legal error. ***State v. McCorkle***, 137 Wn.2d 490, 495–96, 973 P.2d 461 (1999). Here, defendant claims that his offender score was improperly calculated at "2" claiming that it should have been a "1." Defendant is incorrect.

Defendant pleaded guilty to two felonies, rape of a child in the second degree and unlawful delivery of a controlled substance (methamphetamine) to a person under the age of eighteen; both of these are Class A felonies. CP 70-71, 73-82; RCW 9A.44.076(2), RCW 69.50.401(1)(2)(a) and 69.50.406(1). The Sentencing Reform Act (SRA) defines "violent" offenses as including "[a]ny felony defined under any law as a class A felony or an attempt to commit a class A felony[.]" RCW 9.94A.030(54)(a)(i). When calculating the offender score for a violent offense, the SRA directs to "count two points for each prior adult and juvenile violent felony conviction[.]" RCW 9.94A.525(8). Other current offense are treated "as if they were prior convictions for the purpose of offender score[.]" RCW 9.94A.589(1)(a).

Thus, the defendant's offender score was correctly calculated because when sentencing on one of his violent offenses, he would receive two points for his other current violent offense. His offender score was "2" for each of his offenses.

As his offender score was correctly determined and as defendant has failed to show any other infirmity in the voluntary nature of his guilty plea, this court should dismiss the appeal as meritless and affirm the judgment below.

2. THE PETITION MUST BE DISMISSED BECAUSE PETITIONER SEEKS RELIEF FOR CLAIMS THAT WERE WAIVED BY ENTRY OF HIS GUILTY PLEA.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. ***In re Personal Restraint of Hagler***, 97 Wn.2d 818, 823 24, 650 P.2d 1103 (1982). Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs, and they require that collateral relief be limited in state as well as federal courts. *Id.*

In a collateral action, the petitioner has the duty of showing constitutional error and that such error was actually prejudicial. The rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. ***In re Personal Restraint of Mercer***, 108 Wn.2d 714, 718 21, 741 P.2d 559 (1987); ***Hagler***, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to demonstrate actual prejudice.

Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. ***Hagler***, 97 Wn.2d at 825, 26. To obtain collateral relief from an alleged nonconstitutional error, a petitioner must show "a fundamental defect which inherently results in a complete miscarriage of justice." ***In re Personal Restraint of Cook***, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the constitutional standard of actual prejudice. *Id.* at 810.

Reviewing courts have three options in evaluating personal restraint petitions:

> 1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error or a fundamental defect resulting in a miscarriage of justice, the petition must be dismissed;
>
> 2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
>
> 3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the personal restraint petition without remanding the cause for further hearing.

In re Personal Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

In a personal restraint petition, "naked castings into the constitutional sea are not sufficient to command judicial consideration and

discussion." ***In re Personal Restraint of Williams***, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (citing ***In re Personal Restraint of Rozier***, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), which quoted ***United States v. Phillips***, 433 F.2d 1364, 1366 (8th Cir. 1970)). That phrase means "more is required than that the petitioner merely claim in broad general terms that the prior convictions were unconstitutional." ***Williams***, 111 Wn.2d at 364. The petition must also include the facts and "the evidence reasonably available to support the factual allegations." *Id.*

Personal restraint petition claims must be supported by affidavits stating particular facts, certified documents, certified transcripts, and the like. ***Williams***, 111 Wn.2d at 364. If the petitioner fails to provide sufficient evidence to support his challenge, the petition must be dismissed. ***Williams***, 111 Wn.2d at 364. A reference hearing is not a substitute for the petitioner's failure to provide evidence to support his claims. As the Supreme Court stated, "the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations." ***In re Personal Restraint of Rice***, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "Bald assertions and conclusory allegations will not support the holding of a hearing," but the dismissal of the petition. ***Rice***, at 886, ***Williams***, at 364-365.

Although it is difficult to discern precisely what petitioner claims of error are from his petition, they seem[1] to be the following: 1) ineffective assistance of counsel for failure to a) properly investigate the case, b) work with petitioner during the period he was acting pro se, and c) advise him not to contact[2] the victims; 2) not receiving proper credit for time served; 3) being kept in "solitary confinement" for eleven months in the county jail; 4) being denied access to the evidence while he was acting pro se.

As mentioned earlier, a voluntary guilty plea acts as a waiver of the right to appeal all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to challenges of the State's legal power to prosecute regardless of factual guilt. ***State v. Smith***, 134 Wn.2d 849, 852-553, 953 P.2d 810 (1998). Most of petitioner's claims pertain to alleged violations that occurred prior to the entry of his guilty plea and therefore were waived when he pleaded guilty. At best, only two claims survive - ineffective assistance of counsel and denial of earned early release credit for presentence incarceration.

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1 If the court discerns other claims that those articulated above, the State reserved the right to respond to those claims on the merits.

2 Petitioner was served with a no contact order on his first appearance. CP 117-118. Since he was in receipt of a court order not to contact the victims, it is difficult to understand what more his attorney could have done.

a. Petitioner has failed to meet his burden under ***Strickland*** for showing ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, petitioner must show both deficient performance and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. ***State v. Stenson***, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). A reviewing court's scrutiny of counsel's performance is highly deferential; there is a strong presumption that counsel was competent. ***State v. McFarland***, 127 Wn.2d 322, 335–36, 899 P .2d 1251 (1995). To establish prejudice, a defendant must show a reasonable probability that the outcome would have differed absent the deficient performance. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If an ineffective assistance of counsel claim does not support a finding of either deficiency or prejudice, it fails. ***Strickland***, 466 U.S. at 697.

To the extent that petitioner alleges he received ineffective assistance of counsel prior to entering his guilty plea by his attorney's failure to investigate or to work with him as a standby counsel while petitioner was pro se - those claims are waived. Because petitioner entered a guilty plea, the court reviews the reasonableness of counsel's

conduct under the standard for effective assistance of counsel in a plea bargaining context. "In a plea bargaining context, 'effective assistance of counsel' merely requires that counsel 'actually and substantially [assist] his client in deciding whether to plead guilty.'" ***State v. Osborne***, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (alteration in original) (quoting ***State v. Cameron***, 30 Wn. App. 229, 232, 633 P.2d 901, *review denied*, 96 Wn.2d 1023 (1981)). Defense counsel must inform the defendant of all direct consequences of the guilty plea. ***State v. A.N.J.***, 168 Wn.2d 91, 113–14, 225 P.3d 956 (2010). Petitioner fails to identify any direct consequence of his guilty plea of which he as not advised. The trial court's extensive colloquy with petitioner prior to accepting his guilty plea demonstrates that petitioner was fully informed of the consequences of the guilty plea and the rights he was giving up by pleading guilty. 1/9/13 RP 5-17. Both petitioner and trial counsel stated that they had discussed the guilty plea. 1/9/13 RP 3-4, 5-6. Therefore, petitioner has failed to show that defense counsel's performance in assisting him with the decision to enter a guilty plea was deficient and his ineffective assistance of counsel claim fails. ***Strickland***, 466 U.S. at 697.

Petitioner alleges that he was forced into pleading guilty because his "lawyer refused to represent me in trial." Petition at p. 2. Petitioner provides no evidence to support his claim that his lawyer's actions, or

inaction, "force[d] him to plead guilty." While petitioner submitted a declaration in support of his petition, it does not contain any evidence about his decision making process regarding his guilty plea. Bald assertions and conclusory allegations such as these should result in the dismissal of the petition under ***Rice*** and ***Williams***. The State also disputes petitioner's claim about his attorney's lack of investigation. At the sentencing hearing, his attorney noted that petitioner had not always been happy with his representation; the attorney assured the court that he had interviewed witnesses and done a "thorough investigation" in the case and was prepared to represent petitioner at trial. 2/11/13 RP 5. His attorney indicated that petitioner pleaded guilty because he "ultimately saw that this plea was in his best interest given what was likely to happen at trial." *Id.* at 5-6. These representations by the attorney are consistent with the representations petitioner made to the court at the time of his guilty plea. After the court went through a thorough colloquy with petitioner regarding the rights he was giving up and the consequences of his plea, it asked petitioner whether he was "pleading guilty freely and voluntarily[.]" 1/9/13RP 17. Petitioner assured the court that he was and that no one had made any threats to force him to plead guilty. *Id.* Petitioner never indicated that he was entering a guilty plea because he doubted his attorney's ability to represent his interests at trial. As petitioner orally

confirmed to the court statements made in his written plea form and represented to the court that he was entering his plea voluntarily, he "will not now be heard to deny these facts." *See* ***In re Keene***, 95 Wn.2d at 207.

b. Petitioner has failed to support his claim of improper denial of earned early release credit with any competent evidence, but even assuming his representations are correct, he fails to show any error occurred.

Petitioner also complains about his "good time" certification from the county jail, which is more correctly referred to as an earned early release credit. RCW 9.94A.729.

Out the outset, petitioner provides no evidence to support his claims regarding how long he was incarcerated in the Pierce County Jail or a copy of the certification that was sent to the department of corrections by the jail. Under ***Williams***, the court should dismiss his claim for failure to support it with competent evidence.

But even if the court were to take petitioner's claims at face value, petitioner cannot show any error. Petitioner received credit for 363 days served on his judgment and sentence for time served prior to sentencing. CP 90-104 (*see* para. 4.5(c)). By statute, the county jail certifies earned early release credit for presentence incarceration to the department of corrections upon transfer. RCW 9.94A.729(1)(b). Petitioner states in his

petition that the jail certified 40 days of earned early release time. *See* petitioner at p. 2. Under RCW 9.94A.729(3)(b), an offender, such as petitioner, who was convicted of a class A sex offense after July 1, 2003, may not earn aggregate release time in excess of ten percent (10%) of his sentence. Petitioner has acknowledged receiving earned release time of 40 days, which is slightly more than ten percent of the 363 days he served in the jail prior to sentencing. Petitioner has failed to show any error in the amount of earned early release time the jail certified to the department of correction.

Most of petitioner's claims were waived by entry of his guilty plea and the ones that, arguably, survived are unsupported by competent evidence and/or refuted by the record before this court. The petition should be dismissed.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment entered below and dismissed the personal restraint petition.

DATED: January 28, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/28/14
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